CHARLES ELMORE CR
CL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No. 524

MARK BARRETT COSBY,
Petitioner

v.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,
Respondents

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals for the Seventh Circuit.

and

BRIEF IN SUPPORT THEREOF

B. Lacey Catron,
Herbert C. Brook,
Counsel for Petitioner.

SCHNEPP & BARNES, PRINTERS, SPRINGFIELD, ILL.

INDEX

	Page
Petition for writ of certiorari	1
Opinion of the court below	2
Summary statement of the matter involved	2
Jurisdiction of this Court	7
Questions presented	7
Reasons relied on for the allowance of the writ	8
Prayer	9
Brief in support of petition for certiorari	10
Opinion of the court below	10
Statement of the case	10
Specifications of error to be urged	10
Summary of the argument	11
Argument	
I. The proper remedy is by this suit in equity in the Federal Courts, and the Circuit Court of Appeals erred in holding that Cosby Jr. is limited to relief in the Logan County Court	12
II. At the time of the confirmation decree in the Logan County Court Cosby Jr. had a two-thirds interest in fee simple in the Skelton farm and the right to redeem the land from the sale, and could not lawfully be deprived of said property without an opportunity for judicial hearing prior to confirmation	15
III. Cosby Jr. was not, either himself or through his predecessor in title, given an opportunity by the Logan County Court to litigate or protect his title, and the decree of confirmation effecting a conveyance of the title was a deprivation of his property without due process of law contrary to the 14th Amendment; the decisions of the District Court and the Court of Appeals, by giving conclusive effect to this prior decree of the Logan County Court, were a violation of the 5th Amendment	17

IV. Cosby Jr. cannot constitutionally be bound by the decrees of the Logan County Court because there was no effective privity between him and Cosby Sr. at the time those decrees were entered..... 24

V. The confirmation decree can not constitutionally be held to bind the interests of Cosby Jr. because Johnston knowingly failed in his fiduciary duty to join Cosby Jr. as a party and, while purporting to represent him as trustee in Johnston's own petition, suffered the decree to be entered in derogation of Cosby Jr.'s rights without any contest in his behalf. 29

VI. Even if the decrees of the Logan County Court were, in any respect, valid against the interest of Cosby Jr., he is entitled to equitable relief from those decrees against Harts who bought at the sale with full notice and knowledge of the defects in the sale proceeding..... 33

Authorities Cited

Alward v. Borah, 381 Ill. 134, 44 N. E. (2d) 865 (1942) 15, 16

Anderson v. Shepard, 285 Ill. 544, 121 N. E. 215 (1918) 16

Armstrong v. Obucino, 300 Ill. 140, 133 N. E. 58 (1921) 23

Arrowsmith v. Gleason, 129 U. S. 86, 32 L. Ed. 630 (1889) 13, 14, 15

Baker v. Baker, 284 Ill. 537, 120 N. E. 525 (1918).... 21, 28

Barrow v. Hunton, 99 U. S. 80, 25 L. Ed. 407 (1879) 13

Blacker v. Thatcher, 145 F. (2d) 255 (C. C. A. 9th 1944) 15

Bondurant v. Bondurant, 251 Ill. 324, 96 N. E. 306 (1911) 16

Botsford v. O'Conner, 57 Ill. 72 (1870).....15, 17, 24

Brown v. Fletcher's Estate, 210 U. S. 82, 52 L. Ed. 966 (1908) 19, 20, 21, 23

Burket v. Reliance Bank & Trust Co., 367 Ill. 196, 11 N. E. (2d) 6 (1937) 18

Burr v. Bloemer, 174 Ill. 638, 51 N. E. 821 (1898).. 16

Chicago, R. I. & P. Ry. Co. v. Callicotte, 267 F. 799 (C. C. A. 8th 1920) 14

Claflin v. Dunne, 129 Ill. 241, 21 N. E. 834 (1889).... 12

Denk v. Fiel, 249 Ill. 424, 94 N. E. 672 (1911)..... 34

Diamond v. Connolly, 251 Fed. 234 (C. C. A. 9th, 1918) 29

Diamond v. Connolly, 276 Fed. 87 (C. C. A. 9th, 1921) 29

Eddy v. Eddy, 302 Ill. 446, 134 N. E. 801 (1922).... 29

Elliott v. Frakes, 71 Ind. 412 (1880), *reaffirmed on 2nd appeal;* 90 Ind. 389 (1883)..... 28

Essanay Film Mfg. Co. v. Kane, 258 U. S. 358, 66 L. Ed. 658 (1921) 13, 14

Evans v. Ill. Surety Co., 319 Ill. 105, 149 N. E. 802 (1925) 22

Fisher v. Banta, 66 N. Y. 468 (1876)..... 30

Gibson v. Roll, 27 Ill. 88 (1862)..... 15

Graver v. Faurot, 76 Fed. 257 (C. C. A. 7th, 1896).. 14

Green V. Watkins, 6 Wheat. 260, 5 L. Ed. 256 (U. S. 1821) 25

Hansberry v. Lee, 311 U. S. 32, 85 L. Ed. 22 (1940) 17, 25, 28

Hansen v. Swartz, 345 Ill. 609, 178 N. E. 246 (1931) 28

Harris v. Chi. Title & Trust Co., 338 Ill. 245, 170 N. E. 285 (1930).....19, 21, 23

Hedlund v. Miner, 395 Ill. 217, 69 N. E. (2d) 862 (1946) 17, 29

Heppe v. Szczepanski, 209 Ill. 88, 70 N. E. 737 (1904) 15, 30

Hewitt v. Hewitt, 17 F. (2d) 716 (C. C. A. 9th, 1927) 14, 29

Hoffman v. Hanley, 187 Ill. App. 551 (2d Dist. 1914) 20, 23, 28

Hopkins v. Curtis, 43 R. I. 19, 109 Atl. 711 (1920)... 19, 21

Hopkins v. Patton, 257 Ill. 346, 100 N. E. 992 (1913) 27

Hultberg v. Anderson, 252 Ill. 607, 97 N. E. 216 (1912) 18

Hunt v. Acre, 28 Ala. 580 (1856)..... 25

Indiana Harbor Belt RR. Co. v. Calumet, 391 Ill. 280, 63 N. E. (2d) 369 (1945)..... 25

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547 (1884) 13

Johnston v. Cosby, 374 Ill. 407, 29 N. E. (2d) 608 (1940) 17, 27, 33

Kager v. Vickery, 61 Kan. 342, 59 Pac. 628 (1900).. 25

Leininger v. Reichle, 317 Ill. 625, 148 N. E. 384 (1925) 15

LeMoyne v. Harding, 132 Ill. 23, 23 N. E. 414 (1890) 16

Londoner v. Denver, 210 U. S. 373, 52 L. Ed. 1103 (1908) 16, 18

Loyd v. Malone, 23 Ill. 41 (1859)..... 34

Manternach v. Studt, 230 Ill. 356, 82 N. E. 829 (1907) 30

Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870 (1891) 13, 14

McArthur v. Scott, 113 U. S. 340, 28 L. Ed. 1015 (1885) 30

McDaniel v. Traylor, 196 U. S. 415, 49 L. Ed. 533 (1905) 14

McReynolds v. Miller, 372 Ill. 151, 22 N. E. (2d) 951 (1939) 34

National Surety Co. v. State Bank of Humboldt, 120 Fed. 593 (C. C. A. 8th, 1903)..... 14

Nelson v. Meehan, 155 Fed. 1 (C. C. A. 9th, 1907).. 14

Newberry Library v. Bd. of Education, 387 Ill. 85, 55 N. E. (2d) 147 (1944)..... 17

Peo. v. Feicke, 252 Ill. 414, 96 N. E. 1052 (1911).... 30

Peo. *ex rel,* Jones v. Chicago Lloyds, 391 Ill. 492, 63 N.E. (2d) 479 (1945)..... 22

Peo. v. Russell, 283 Ill. 520, 119 N. E. 617 (1918).... 26

Pfister v. Johnson, 13 Fed. Supp. 662 (N.D. Okla. 1936) 30

Phillips v. Parker, 148 Kan. 474, 82 P. (2d) 708 (1938) 28

Postal Tele. Cable Co. v. Newport, 247 U. S. 464, 62 L. Ed. 1215 (1918) 17, 24, 28

Quigley v. Breckenridge, 180 Ill. 627, 54 N. E. 580 (1899) 16

Rabbit v. Weber & Co., 297 Ill. 491, 130 N. E. 787 (1921) 18

Requa v. Holmes, 16 N. Y. 193 (1857), reaffirmed 26 N. Y. 338 (1863) 25

Retzinger v. Retzinger, 337 Ill. 378, 169 N. E. 176 (1929) 16

Rives v. Stanford, 188 Okla. 108, 106 P. (2d) 1101 (1940) 20, 23

Sargeant v. Rowsey, 89 Mo. 617, 1 S. W. 823 (1886).. 25

Simon v. Southern Railway, 236 U. S. 115 59 L. Ed. 492 (1915) 13, 14

Simon v. Craft, 182 U. S. 427 45 L. Ed. 1165 (1901) 18

Smyth v. Ames, 169 U. S. 466, 42 L. Ed. 819 (1898) 14

Sutton v. Read, 176 Ill. 69, 51 N. E. 801 (1898)..... 28

Swope v. Swope, 173 Ala. 157, 55 So. 418 (1911).... 30

U. S. v. Mashunkashey, 72 F. (2d) 847 (C. C. A. 10th, 1934) 14

U. S. v. Walker, 109 U. S. 258, 27 L. Ed. 927 (1883).. 22

Walker v. Cook, 294 Ill. 294, 128 N. E. 584 (1920) 29

Weberpals v. Jenny, 300 Ill. 145, 133 N. E. 62 (1921) 28

Welch v. Louis, 31 Ill. 446 (1863)..... 20, 22

Wells Fargo & Co. v. Taylor, 254 U. S. 175, 65 L. Ed. 205 (1920) 14

Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914 (1876) 18

Wright v. Simpson, 200 Ill. 56, 65 N. E. 628 (1902) 29

Zaegel v. Kuster, 51 Wis. 31, 7 N. W. 781 (1881).. 25

Statutes

Ill. Rev. Stat. (1937), c. 3, para. 100, 103, 110....15, 16, 29

Texts

2 Freeman, Judgments (Fifth Edition, 1925) § 629, 633 and 634, pp. 1327, 1333, 1336..... 26, 27

Restatement, Judgments (1942), c. 2, §6; c. 4, §91, pp. 450, 451, 454; c. 5, § 112, pp. 532, 536-7 and § 118, p. 570 .....14, 17, 19, 31, 32

II Van Fleet, Former Adjudication (1895), c. XVII, p. 909 24

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1948

No._____

MARK BARRETT COSBY,

Petitioner

v.

DAVID H. HARTS, FLORENCE J. HARTS and PERCY B. JOHNSTON,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

NOW COMES Mark Barrett Cosby and respectfully petitions this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Circuit Court of Appeals rendered and entered on the 23rd day of July, 1948, in this case, lately pending in that Court

and styled Mark Barrett Cosby and Adele Vance Milem, Plaintiffs-Appellants, v. David H. Harts, Florence J. Harts and Percy B. Johnston, Defendants-Appellees, being cause No. 9258 of civil causes on the docket of that Court, affirming a judgment of the United States District Court for the Southern District of Illinois, Southern Division, rendered in said cause in favor of respondents and against your petitioner.

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit, which petitioner here seeks to have reviewed, appears on pp. 431 to 438, inclusive, of the printed transcript of the record filed herewith and is reported in 169 F. (2d) at page 689.

Summary Statement of the Matter Involved

The plaintiff, your petitioner, Mark Barrett Cosby, Jr. and his mother, Adele Vance Milem, brought this action as an original suit in equity to recover certain farm land from the defendant and respondent, David H. Harts, who holds said land under an executor's deed made in consequence of a sale in a prior proceeding to sell real estate to pay debts in the estate of May Barrett Chappelear, held in the County Court of Logan County, Illinois; the suit asks that Harts and his wife be directed to convey and deliver possession of said farm to the plaintiffs and also that said defendants be ordered to account for rents and profits realized from said farm, but plaintiffs declared themselves ready and willing to pay defendants, as a condition to the conveyance, such amount as the court should decree to be justly due and owing to defendants and to do equity in the premises.

Your petitioner, Cosby, Jr., is the son, and his co-plaintiff, Adele Vance Milem, is the widow of Mark Barrett Cosby, Sr., who was the only son of May Barrett Chappelear. Cosby, Jr., was a minor, under 16 years of age at the time of the sale proceedings. The defendant, David H. Harts, is, and for many years has been the husband of the defendant, Florence Johnston Harts, sister of the defendant, Percy B. Johnston, who was named both executor and trustee by Mrs. Chappelear's will.

The farm involved is known as the Skelton farm and is comprised of 425 acres located in Logan County, Illinois. The land was part of the estate of May Barrett Chappelear

who died testate in 1937, leaving all her real estate in trust to Johnston, with directions to pay the net income for life to Cosby, Sr. and, after his death, to the lawful heirs of his body living at the time of his death, and upon the death of the last survivor of such heirs or in the event there were no lawful heirs of his body, the trust was to terminate and the corpus to be distributed to the heirs of certain other relatives (R. 16, 17).

The will was admitted to probate in the County Court of Logan County on January 25, 1938 (R. 300), and letters were issued to Johnston as executor. On May 19, 1938 Johnston filed petition in the Logan County Court to sell the Skelton farm to pay debts (R. 255-8). At all times during the pendency of the sale proceeding, the trust under the Chappelear will was considered valid and Cosby, Jr. was conceded to have a life estate therein subject to the prior life estate of his father, Cosby, Sr. (alleged in para. 4 and 11 Amended Complaint, R. 4, 6; admitted by all defendants para. 4, 11 of Answer, R. 26, 28, 36, 38).

But Johnston named, as parties defendant to the petition for sale, only Cosby, Sr., The Hancock Insurance Company, which held a mortgage on the farm, two tenants in possession and two specific legatees of personalty under the will. Neither Cosby, Jr., the devisees of the remainder in fee following the trust, nor Johnston, as trustee, were joined as defendants (R. 255).

In his sworn petition (R. 256-258) Johnston alleged that Mrs. Chappelear had ". . . devised and bequeathed all of her property unto your petitioner, as Trustee, on the terms and conditions in said Will contained, . . ." Throughout the sale proceeding Johnston admittedly acted in a dual fiduciary capacity, as petitioner-executor and as trustee holder of the legal title (para. 11 of Answer of Harts and wife, R. 38; para. 14 of Johnston's Answer, R. 29).

In its order of sale of June 6, 1938, the County Court of Logan County confirmed the trust and the estates under the will by finding that the allegations of the petition were true (R. 274). The County Court also found the fair cash market value of the equity in the farm to be $15,000 (R. 275).

At the sale, held on July 2, defendant Harts, brother-in-law of Johnston, was high bidder at $6,472 for the equity, including all 1938 crops; he took the property subject to the mortgage indebtedness but did not assume to pay such indebtedness.

Cosby, Sr. was very dissatisfied with the result of the sale and indicated that he was going to get the sale set aside (R. 201-202, R. 323-324, R. 325). Edwin Mills, who was attorney for Johnston, had several conversations with Cosby, Sr. in which the latter expressed his dissatisfaction (R. 90-92). Mills prepared a draft of an adverse report of sale which ended as follows:

> "The undersigned further respectfully reports unto the Court that said purchase price represents a valuation of said property at the rate of $110.00 per acre, which the undersigned believes to be an inadequate price for said real estate; and the undersigned further reports unto the court that at said sale there were only two bidders upon the whole of said premises and that in the opinion of the undersigned said property did not bring an adequate amount of money." (Amend. Compl., para. 6, R. 5; Plfs.' Ex. 1, R. 276-278, as corrected.)

Harts learned immediately after the sale that Cosby was going to file objections and talked the matter over with Johnston ". . . a great many times . . ." (R. 167-169.) When Mills took the above report to Johnston he was not satisfied with it and, upon Johnston's request, Mills drew a line through each line of the paragraph above quoted and inserted immediately thereafter the following paragraph:

> "The undersigned further respectfully reports unto the Court that he is informed and believes that certain persons interested in said estate and in said premises will file objections to the confirmation of said sale and that therefore the undersigned submits the matter to the Court without a request either for confirmation of (sic) rejection of said sale." (Amend. Compl., para. 6, R. 6; Plfs.' Ex. 1, R. 278, as corrected.)

The executor's report, in its final form, was filed on July 6 and on July 16 Cosby, Sr. filed his objections to the report, prepared by Mills and contained in a blue backed cover which bore the inscription "Edwin C. Mills, Attorney-at-Law, Lincoln, Illinois" (R. 304-305), although Mills testified he told Cosby, Sr. that he could not represent him because he represented the executor (R. 91). The objections alleged that the price received for the farm was inadequate and did not constitute a fair valuation of the premises, that the sale was inadequately advertised so that bidders and interested persons were unaware of the sale and were not present; that there were only two bidders at

the sale and that there were other persons ready, willing and able to bid a larger amount, if the property were ordered resold, and concluded with the statement "All the matters and things this defendant says he is ready to prove on the hearing hereof as this Honorable Court shall direct . . . , wherefore he excepts to said report and prays that after full consideration by the Court said report may be disapproved and said real estate be ordered to be resold." (R. 280-281.)

On July 18 the court continued the hearing on the report to August 2, on which day it set the exceptions for hearing also. Cosby, Sr. died on July 21, leaving as his only heirs his widow and son, plaintiffs in this suit. Harts (R. 169), Johnston (R. 185), Mills and Judge Stringer (R. 92-93) of the County Court of Logan County all knew of Cosby, Sr.'s death on July 21. But when the report and exceptions came on for hearing on August 2, Mills alone was present in court, and when the fact of Cosby's death was referred to, the Judge observed in substance (Mills' testimony, R. 93):

> " 'These objections then can be overruled, there is no one here to push them or present them . . .'."

and Mills said " '. . . . I presume so . . .'." and the Judge then entered the order overruling the objections and confirming the sale (R. 282-284). Johnston executed his deed conveying the farm to Harts on August 3, 1938.

The plaintiffs had arrived in Lincoln for the first time on July 24, 1938 to attend Cosby, Sr.'s funeral, had met Johnston, who had told Mrs. Milem that the Skelton farm had to be sold (R. 110-111). But Johnston did not tell Cosby Jr. or Mrs. Milem that the hearing on the report and the objections to the sale had not been held at the time of Cosby, Sr.'s death but was set for August 2, that Cosby, Sr. was not represented by counsel or that he, Johnston, had refused in his report of sale to make a recommendation for approval or disapproval of the sale but had left the matter to rest with the court on Cosby, Sr.'s objections (R. 141, 110-113).

After Cosby, Sr.'s funeral, Johnston suggested and Mrs. Milem agreed that he act as administrator for Cosby Sr.'s estate. He told Mrs. Milem that she had nothing to worry about, that he would take care of everything for her and her son and that they need not remain on in Lincoln (R. 112).

On Saturday, July 30, three days before the date set for the hearing on the objections and the report of sale, Johnston drove the plaintiffs down and put them on the train bound for California (R. 113). There was no substitution of the plaintiffs as parties to the sale proceeding and nothing was done by Johnston or any one else to provide Cosby, Jr. or Mrs. Milem with representation at the hearing on August 2, or to obtain representation to present Cosby, Sr.'s objections at the hearing.

About one year later, on August 25, 1939, Mrs. Milem and her son executed a quit claim deed (prepared by Harts' attorney at his request—R. 174) for the farm to Harts, when Cosby, Jr. was still a minor, about 17 years of age. Subsequently, in May, 1944, he and his mother filed a disaffirmance of the quit claim deed in the Office of the Recorder of Logan County, Illinois (R. 318-321); and the District Court set aside the quit claim deed as to Cosby, Jr. (R. 421).

On July 1, 1939, Johnston, as executor and trustee under the Chappelear will, and also as administrator of the estate of Cosby, Sr., filed a petition in the Circuit Court of Logan County to construe the Chappelear will. On March 25, 1940 the Circuit Court decreed that the trust created by the will was void as violating the rule against perpetuities, leaving the property in the estate to descend as intestate property to Cosby, Sr. On October 15, 1940, a little more than two years after the sale proceedings, the Illinois Supreme Court affirmed the decree of the Logan County Court construing the will. *Johnston v. Cosby,* 374 Ill. 407, 29 N.E. (2d) 608 (1940). The opinion of the court in that case makes no reference to the proceeding to sell real estate to pay debts and Harts, the purchaser at the sale of the Skelton farm, was not a party to that suit.

In November, 1943, Cosby, Jr., became of age, and six months later, after filing his notice of claim to the Skelton farm (R. 318-321), he joined with his mother in filing the present suit on May 22, 1944, seeking to recover the Skelton farm on the ground that the plaintiffs were not bound by the decrees of the Logan County Court by reason of the failure to give them notice as parties and an opportunity to be heard and also by reason of fraud and collusion of Johnston and Harts. After a trial of the issues, the court concluded as a matter of law that the County Court of Logan County had jurisdiction of the necessary parties to enter the orders of sale and confirmation and that such

orders could not be attacked in the present suit but only in the County Court of Logan County, that Mrs. Milem was barred by estoppel of her quit claim deed of August 25, 1939 and that plaintiffs' amended complaint, except for the setting aside of the quit claim as to Mark Barrett Cosby, Jr., be dismissed for want of equity (R. 419-421).

Plaintiffs appealed said cause to the United States Circuit Court of Appeals for the Seventh Circuit, where said appeal was, on April 29, 1948, duly argued and submitted by counsel (R. 430). Thereafter on July 23, 1948, said Circuit Court of Appeals filed its opinion in said cause, affirming the judgment of the District Court (R. 431-439).

Jurisdiction of This Court

The jurisdiction of this court is based upon Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U.S.C.A. §347, providing for review by this court, by certiorari, of decisions of the Circuit Court of Appeals. The judgment of the United States Circuit Court of Appeals sought to be reviewed was entered on July 23, 1948 (R. 439). A petition for rehearing, duly filed by plaintiffs on August 23, 1948, within the time extended by the Circuit Court of Appeals (R. 439-440), was denied by said Circuit Court of Appeals on September 29, 1948 (R. 452). The time in which to file petition for certiorari in this Court was extended to and including January 27, 1949 by the order of this Court (R. 455).

Questions Presented

The questions presented by petitioner herein for certiorari are:

1. Whether the judgment of the Circuit Court of Appeals, affirming the judgment of the District Court, denying that Federal courts of equity have jurisdiction of this suit and limiting your petitioner's remedy to some action in the state courts is an improper denial of the constitutional jurisdiction of Federal courts of equity.

2. Whether it was a denial of due process of law in violation of the 14th Amendment to the U. S. Constitution for the County Court of Logan County, Illinois, to enter its decrees of sale and confirmation effecting a conveyance of your petitioner's property to the defendant Harts, without joining your petitioner as a party or giving him notice and an opportunity to be heard either on his own objections or on objections filed by his supposed predecessor in interest.

3. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, by reason of an alleged "privity" with one who was a party but who, within the knowledge of the Logan County Court and the remaining parties, died before the confirmation decree was entered.

4. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, by reason of an alleged "privity" with one who was a party, based upon the decision in a subsequent case that a will was void, although the Logan County Court found the trust and interests under the will to be valid so that no privity could exist.

5. Whether your petitioner is constitutionally bound by the decrees in a proceeding in which he was not a party and had no opportunity to be heard, although he was a devisee and claiming an interest in the property sold, and where the executor and trustee under the will, while undertaking to represent your petitioner's interests against the executor's own petition for sale, suffered the decree of confirmation to be entered in derogation of your petitioner's rights without any contest in his behalf.

6. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court, holding your petitioner bound by the said decrees of sale and confirmation of the Logan County Court and denying relief from said decrees constituted a violation of the 5th Amendment to the U. S. Constitution in giving unwarranted effect to the decrees of the Logan County Court.

7. Whether the judgment of the Circuit Court of Appeals affirming the judgment of the District Court, improperly denied your petitioner equitable relief from the decrees of the Logan County Court.

Reasons Relied on for the Allowance of the Writ

This case presents several novel and important questions of due process of law under the 14th and 5th Amendments to the U. S. Constitution, which have not been, but should be, settled by this Court; the opinion of the Circuit Court of Appeals for the Seventh Circuit in this case appears to be at variance with applicable principles laid down by this Court in analogous cases involving due process of law.

Also, the decision of the Circuit Court of Appeals in this case, in denying the jurisdiction of the Federal courts of

equity herein, appears to be directly in conflict with the constitutional jurisdiction of such courts in cases of diverse citizenship, as that jurisdiction has been expounded in the decisions of this Court and the decisions of the circuit courts of appeals in the other circuits.

Prayer

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the United States Circuit Court of Appeals for the 7th Circuit to the end that the judgment of said Court of Appeals in the said cause be reviewed by this Court, as provided by law, and that upon such review, the judgment of said Court of Appeals in said cause, of date July 23, 1948, be reversed as to your petitioner, and that your petitioner have such other relief as to this Court may seem appropiate.

B. Lacey Catron,
Herbert C. Brook,
Attorneys for Petitioner

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the United States Circuit Court of Appeals for the 7th Circuit, which petitioner here seeks to have reviewed, appears on pp. 431 to 438 inclusive of the printed transcript of the record filed herewith, and is reported in 169 F. (2d) at pp. 689-694.

Statement of the Case

The essential facts of the case are fully stated in petitioner's petition for writ of certiorari, and in the interest of brevity are not repeated here.

Specifications of Error to Be Urged

The Circuit Court of Appeals erred:

1. In affirming the judgment of the District Court dismissing the amended complaint for want of equity.

2. In holding that the decrees of the Logan County Court in the prior sale proceeding were valid and binding on Cosby Jr. and his interest in the property sold.

3. In holding that Cosby Jr. was in privity with Cosby Sr. at the times the decrees of sale and confirmation were entered in the Logan County Court.

4. In holding that the Logan County Court, in the prior sale proceeding, had jurisdiction of all necessary parties to enter a valid decree.

5. In holding that the Logan County Court, in the prior sale proceeding, was empowered to enter valid decrees of sale and confirmation, binding on Cosby Jr. and his interest in the property sold, without joining him as a party and without giving him notice or an opportunity to be heard.

6. In holding that the Federal courts are not the proper forum for Cosby Jr. to seek relief from the decrees of the Logan County Court in the prior sale proceeding.

7. In holding that the Federal courts of equity do not have jurisdiction of the present suit for relief from said decrees of the Logan County Court, although the plaintiffs herein were of diverse citizenship from the defendants.

8. In failing to hold that Cosby Jr. was, under the applicable Illinois statutes, a necessary party to the prior sale proceeding in the Logan County Court, and that his nonjoinder therein caused the decrees of that Court to constitute a deprivation of his property without due process of

law under the 14th Amendment to the U. S. Constitution; and that the judgment of the District Court in this case gave unwarranted effect to the decrees of the Logan County Court and therefore constituted a violation of the 5th Amendment to the U. S. Constitution.

9. In failing to hold that the decree of confirmation entered by the Logan County Court in the prior sale proceeding, with knowledge of the death of Cosby Sr. but without joining Cosby Jr. as a party or giving him notice and an opportunity to be heard, constituted a deprivation of his property without due process of law contrary to the 14th Amendment to the U. S. Constitution; and that the decision of the District Court, in holding Cosby Jr. bound by the confirmation decree, gave unwarranted effect to the decrees of the Logan County Court and constituted a violation of the 5th Amendment to the U. S. Constitution.

10. In failing to hold that the prior sale proceeding in the Logan County Court was non-adversary, fraudulent in law, and not valid to bind Cosby Jr. or his interest in the land sold and that the decision of the District Court, in holding Cosby Jr. and his interest in the land bound by the decrees of the Logan County Court, gave unwarranted effect to those decrees and constituted a deprivation of his property without due process of law contrary to the 5th Amendment to the U. S. Constitution.

11. In failing to hold that Cosby Jr. was entitled, in the Federal courts of equity, to avoid and obtain relief from the sale and confirmation decrees entered by the Logan County Court in the prior sale proceeding, and to redeem and recover the land which was sold from the defendant Harts, to the extent of Cosby Jr.'s 2/3rds interest in the premises.

Summary of Argument

Cosby Jr.'s contentions are these: (1) The lack of an opportunity to be heard is a matter of substance over which the federal courts of equity must take jurisdiction when called upon to do so by a person of diverse citizenship. (Point I, pp. 12-15). (2) That, at the time of the confirmation decree in the Logan County Court, Cosby Jr. had a vested interest in fee simple in the land sold and the right to redeem the land from the sale, of which rights he could not lawfully be deprived without a hearing or an opportunity for a hearing. (Point II, pp. 15-17). (3) That the knowledge on the part of the Logan County Court of the

death of Cosby Sr. made any possible "privity" between Cosby Sr. and Cosby Jr. entirely ineffective, and the attempt by that Court to confirm the sale of the property to another, without giving Cosby Jr. an opportunity to be heard either in his own behalf or on the objections filed by Cosby Sr., constituted a deprivation of his rights without due process of law; and the decisions of the District Court and the Court of Appeals in this case, giving binding effect to the former decree of the County Court, without allowing Cosby Jr.'s redemption and recovery of the land as prayed in his complaint, constitute a deprivation of his property rights without due process of law. (Point III, pp. 17-24). (4) That Cosby Jr. was in the position of a stranger to the sale proceeding in the Logan County Court because there was no effective privity between him and Cosby Sr., and therefore, he cannot be constitutionally bound by the sale and confirmation decrees of that Court. (Point IV, pp. 24-29). (5) That the confirmation decree of the Logan County Court cannot constitutionally be held to bind the interests of Cosby Jr., because as a result of the conduct of the fiduciary, Johnston, the sale proceeding was rendered wholly non-adversary and fraudulent in law. (Point V, pp. 29-33). (6) That whether or not the decrees of the Logan County Court were invalid against Cosby Jr., his lack of an opportunity to be heard entitled him to equitable relief from those decrees against the purchaser, Harts, who took with full notice and knowledge of the defects in the sale proceeding. (Point VI, pp. 33-34).

Argument

I.

The proper remedy is by this suit in equity in the Federal Courts, and the Circuit Court of Appeals erred in holding that Cosby Jr. is limited to relief in the Logan County Court.

The opinion of the Circuit Court of Appeals (R. 43, 437) recognizes that the confirmation decree of the Logan County Court in the sale proceeding was "undoubtedly erroneous" but holds that the "irregularities" of that proceeding did not make the confirmation "void" as to plaintiffs but only "voidable" by *action in the Logan County Court*, citing *Claflin v. Dunne*, 129 Ill. 241, 21 N.E. 834 (1889). In so holding, we submit the Circuit Court of Appeals has totally misconceived the nature of the defects in the sale proceeding and overlooked fundamental principles of federal equity jurisdiction. The defects in the sale proceeding are not mere technical or formal irregularities. In

this case the plaintiffs were not parties to the sale proceeding and have never had an opportunity, either themselves or through their supposed predecessor in title, for a fair hearing on the confirmation issues, and this fact was known to the parties and the court before the confirmation decree was entered. The only defects the correction of which would be limited to the county court are mere formal irregularities. The true line of demarcation between such formal irregularities, properly remedied by *coram nobis* or bill of review on the one hand, and the lack of an opportunity to be heard on the other hand, was made by this Court in 1879 in the case of *Barrow v. Hunton*, 99 U. S. 80, 83, 25 L. Ed. 407 (1879). This distinction was further explained, elaborated, and approved by this Court in *Johnson v. Waters*, 111 U. S. 640, 667, 28 L. Ed. 547 (1884); *Arrowsmith v. Gleason*, 129 U. S. 86, 98, 32 L. Ed. 630 (1889); and *Marshall v. Holmes*, 141 U. S. 589, 596-600, 35 L. Ed. 870, (1891).

The lack of an opportunity to be heard is always a matter of substance. Where it results from lack of proper service or conscious denial by the court of a hearing, the court is said to have lacked jurisdiction or to have exceeded its jurisdiction, and the decree of the court will be held void against a person so denied due process in violation of the 14th Amendment. The person affected can question the decree collaterally, either defensively or offensively. *Essanay Film Mfg. Co. v. Kane*, 258 U. S. 358, 66 L. Ed. 658 (1921) and cases cited at page 362 therein. Or such person can obtain relief from the judgment by an independent suit in equity in the federal court. *Simon v. Southern Railway*, 236 U. S. 115, 59 L. Ed. 492 (1915).

At page 5 of its opinion, the Circuit Court of Appeals states that a court of equity will not interfere with a judgment obtained in another court merely because it is erroneously or irregularly entered, and then concludes:

> "Hence, whether such proceeding be described as a collateral or direct attack, it appears to be available only under such circumstances as render the original judgment or decree void and subject to collateral attack."

This conclusion does not follow from the premise and is directly contrary to all of the authorities on the subject. Where a court has obtained jurisdiction of a person but, without the knowledge of the court, that person has in fact been deprived of an adversary hearing by some misfor-

tune, such as accident, mistake or fraud, and without his own fault, the decree of the court, though valid and not subject to collateral attack, is "voidable" by the injured person in an independent suit in equity such as the present suit, (*Restatement, Judgments* (1942), c. 5, § 112, p. 532, et seq.); and the suit in equity in such cases is not a "collateral" attack on the decree (*Restatement, Judgments* (1942), § 112, *Comment* f., pp. 536-7). Numerous decisions of this and other federal courts support the above rule. *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. Ed. 630; *Marshall v. Holmes*, 141 U. S. 589, 35 L. Ed. 870; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. Ed. 533; *Simon v. Southern Railway Company*, 236 U. S. 115, 59 L. Ed. 492; *Wells Fargo & Co. v. Taylor*, 254 U. S. 175, 65 L. Ed. 205; *Essanay Film Mfg. Co. v. Kane*, 258 U. S. 358, 66 L. Ed. 658; *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593 (C. C. A. 8th, 1903); *Chicago, R. I. & P. Ry. Co. v. Callicotte*, 267 Fed. 799 (C. C. A. 8th, 1920); *U. S. v. Mashunkashey*, 72 F. (2d) 847 (C. C. A. 10th 1934); *Hewitt v. Hewitt*, 17 F. (2d) 716 (C. C. A. 9th, 1927); a large number of pertinent cases are collected and reviewed by the Court of Appeals for the Ninth Circuit in *Nelson v. Meehan*, 155 Fed. 1 (C. C. A. 9th 1907).

Previous to the decision in the present case the Circuit Court of Appeals for the Seventh Circuit has given full support to the above rule, *Graver v. Faurot*, 76 Fed. 257 (C. C. A. 7th 1896).

In the present case, the Circuit Court of Appeals was apparently reluctant to hold that plaintiffs had a proper remedy in the federal courts as long as there *might* be a remedy available to them in the Logan County Court. We have shown in Point II of plaintiffs' petition for rehearing, (R. 447-449) that, because of the peculiar circumstances and knowledge of the county court in the sale proceeding, it is very unlikely that plaintiffs had a remedy in the state courts by bill of review or any type of action other than an original action in equity such as the present suit.

But the fact that plaintiffs may have had a remedy in the state courts is immaterial; the federal court is bound to take jurisdiction of all cases where equities of substance are involved and the parties are of diverse citizenship, and the federal court may not lawfully renounce that jurisdiction. *National Surety Co. v. State Bank of Humboldt*, 120 Fed. 593, 602-605 (C. C. A.8th, 1903) citing *Smith v. Ames*, 169 U. S. 466, 516, 42 L. Ed. 819; *Arrowsmith v. Gleason*,

129 U. S. 86, 98, 32 L. Ed. 630, and other cases. The federal court is bound to take jurisdiction even of a will construction suit, although probate proceedings involving the will are pending in the state court. *Blacker v. Thatcher*, 145 F. (2d) 255 (C. C. A. 9th 1944), *certiorari* denied February 26, 1945; 324 U. S. 848 (1945).

II.

At the time of the confirmation decree in the Logan County Court Cosby Jr. had a two-thirds interest in fee simple in the Skelton farm and the right to redeem the land from the sale, and could not lawfully be deprived of said property without an opportunity for judicial hearing prior to confirmation.

In Illinois, a proceeding to sell real estate of a decedent is not *ex parte* but is essentially hostile in every respect to the interests of the heirs and devisees. *Gibson v. Roll*, 27 Ill. 88 (1862). Thus personal jurisdiction over the heirs, devisees and all persons "having or *claiming* any interest" in the land to be sold is required by statute.[1] And the proceeding is not *in rem* but is strictly *inter partes* so that any person who has an interest in the land but who is not made a party will not be bound by the proceeding. *Alward v. Borah*, 381 Ill. 134, 44 N.E. (2d) 865 (1942); *Leninger v. Reichle*, 317 Ill. 625, 148 N. E. 384 (1925); *Heppe v. Szczepanski*, 209 Ill. 88, 70 N. E. 737 (1904).

A non-party holding an interest will not be bound by the sale proceeding even though his interest did not vest until after the proceeding had begun. *Botsford v. O'Conner*, 57 Ill. 72 (1870). The title to decedent's land descends directly to his heirs or devisees, subject only to a power in

1. ILL. REV. STAT., 1937 c. 3 provides in part as follows:
"100. Petition — Parties] § 99. The mode of commencing the proceedings for the sale of real estate in such cases shall be by the filing of a petition by the executor or administrator in the circuit or county court of the county where letters testamentary or of administration were issued. The widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, and the conservator of such as have conservators, and all persons holding liens against the real estate described in the petition, or any part thereof, or having or claiming any interest there in possession or otherwise shall be made parties. If there are persons interested in the premises whose names are not known, then they shall be made parties by the name of unknown owners. [As amended by act approved June 15, 1887. In force July 1, L. 1887, p. 3.]
"103. Summons.] § 102. Upon the filing of the petition, summons shall be issued, served and returned as in other civil cases. [As amended by act approved July 2, 1937. L. 1937, p. — (H. B. No. 333).]"

the administrator or executor to subject it to sale to pay debts strictly in the manner provided by statute. *Alward v. Borah*, 381 Ill. 134, 136, 138, 44 N. E. (2d) 865 (1942); *Burr v. Bloemer*, 174 Ill. 638, 640, 51 N. E. 821 (1898); *Anderson v. Shepard*, 285 Ill. 544, 548, 121 N. E. 215 (1918). The title of the heirs or devisees is not cut off by the decree of sale but is retained by them until a confirmation decree which is valid and binding on them has been entered. *LeMoyne v. Harding*, 132 Ill. 23, 28, 23 N. E. 414 (1890), approved in *Alward v. Borah*, 381 Ill. 134, 136, 44 N. E. (2d) 865 (1942). The heirs or devisees have not only the title but also the right to protect their title by redemption of the land by payment of the indebtedness of the estate (*Retzinger v. Retzinger*, 337 Ill. 378, 169 N. E. 176 (1929), or by asking for a resale and substituting a purchaser who will agree to pay a higher price on resale and make a binding advance bid or guarantee against loss on resale. (*Bondurant v. Bondurant*, 251 Ill. 324, 96 N. E. 306 (1911); *Quigley v. Breckenridge*, 180 Ill. 627, 54 N. E. 580 (1899)).

The right of the heirs or devisees to redeem the land before confirmation is such that where a confirmation decree has been improperly entered it will be set aside in order to give them an opportunity to redeem, even though there has already been a hearing on the issues of confirmation and it has been shown that the sale is one which merits confirmation. *Retzinger v. Retzinger*, 337 Ill. 378, 382, 169 N. E. 176 (1929).

By the Illinois statute[2], a judicial hearing of any objections or exceptions filed to the report of sale is expressly made a condition precedent to the entry of a valid decree of confirmation. Obviously, a true judicial hearing is required as a matter of constitutional law where objections have been filed. *Londoner v. Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112 (1908).

---

2. ILL. REV. STAT., 1937, c. 3 provides as follows:

"110. Sale—Time of—Notice—Terms—Return.] § 109. . . . It shall be the duty of the executor or administrator making such sale within ten days thereafter, to file in the office of the Clerk of said Court a complete report of said sale, giving a description of the premises sold, to whom, where, and upon what terms sold, and a general statement of the manner in which the terms of the decree were executed. Any person interested in the premises sold, and any creditor of the estate may, within fifteen days after such sale file exceptions to such report, and upon the hearing thereof the Court may approve such report and confirm the sale, or disapprove the same and order the premises to be re-sold. [As amended by act approved June 21, 1933. L. 1933, p. 3.]"

III.

Cosby Jr. was not, either himself or through his predecessor in title, given an opportunity by the Logan County Court to litigate or protect his title, and the decree of confirmation directing a conveyance of the title was a deprivation of his property without due process of law contrary to the 14th Amendment; the decisions of the District Court and the Court of Appeals, by giving conclusive effect to this prior decree of the Logan County Court, were a violation of the 5th Amendment.

The doctrine of *res judicata* presupposes a valid judgment. That doctrine is based on the assumption that the person to be affected by a judgment or someone with whom he was in "privity" has litigated or had an opportunity to litigate, in adversary proceedings, the same matter in a former action in a court of competent jurisdiction. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 474-476, 62 L. Ed. 1215, 1220-1221 (1918); *Hansberry v. Lee*, 311 U. S. 32, 85 L. Ed. 22 (1940); *Hedlund v. Miner*, 395 Ill. 217, 231, 69 N. E. (2d) 862 (1946); *Newberry Library v. Board of Education*, 387 Ill. 85, 91-92, 55 N. E. (2d) 147, 150-151 (1944). And as the County Court could not, consistently with the 14th Amendment, enter a judgment directing a conveyance of property without giving an owner thereof a hearing or an opportunity to be heard, so the District Court and the Circuit Court of Appeals can not, without disregarding the requirement of due process, give a conclusive effect to the County Court decree against Cosby Jr., who was neither a party nor in effective privity with a party therein. *Postal Telegraph Cable Co. v. Newport*, 247 U. S. 464, 62 L. Ed. 1215 (1918); *Hedlund v. Miner*, 395 Ill. 217, 69 N. E. (2d) 862 (1946); *Botsford v. O'Conner*, 57 Ill. 72 (1870).

> As said in *Restatement, Judgments* (1942), § 118, p. 570: "A basic requirement of an action which can lead to a valid judgment is that a procedure should be adopted which in the normal case will give to the parties an opportunity for a fair trial which is reasonable in view of the requirements of public policy in the particular type of case."

It is argued by the defendants and held by the Court below that the decision in *Johnston v. Cosby*, 374 Ill. 407, 29 N. E. (2d) 608 (1940) decided some two years after the sale proceeding, established that Cosby Jr. was "in privity" with

Cosby Sr., who was determined to take the entire estate of Mrs. Chappelear by intestacy. But the adoption of that view ignores the fact that no procedure was taken after Cosby Sr.'s death in order to give Cosby Jr. an opportunity for a fair trial either on his own behalf or on the objections filed by Cosby Sr.

On August 2, 1938, at the time set for the hearing the sole person to appear before Judge Stringer was Edwin Mills, who was the attorney for Johnston, as Executor, and whose name appeared as attorney on the blueback cover of Cosby Sr.'s objections then on file. Both Judge Stringer and Mills knew that Cosby Sr. was dead, having died July 21, 1938. In the District Court Mr. Mills testified that he and Judge Stringer were present, that either he or Judge Stringer mentioned that Cosby Sr. had passed away, and that the Judge then said to him in substance:

> " . . . These objections then can be overruled, there is no one here to push them or present them . . . "

and Mills said:

> " " . . . I presume so . . . "

and that the Judge then entered the Order. (R. 93.)

The Court heard no evidence or any argument of counsel either for or against the objections or the report of sale; there was, in fact, no judicial hearing.

Where a person is made a party to the suit and given notice by summons or other legal process, it is assumed, unless the contrary is brought to the attention of the Court, that the party will have a fair opportunity to take the proper steps in his own behalf and for his own protection, even though he is in fact incompetent to do so. *Simon v. Craft*, 182 U. S. 427, 436, 45 L. Ed. 1165 (1901). But in the case of a party to an action, if he comes into court and files objections or pleadings, the court cannot render a constitutionally valid judgment against him without giving him a fair opportunity to be heard on his pleadings; the judgment will be held a violation of the Fourteenth Amendment. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Londoner v. Denver*, 210 U. S. 373, 385-386, 52 L. Ed. 1103, 1112, (1908); *Burket v. Reliance Bank & Trust Co.*, 367 Ill. 196, 201, 11 N. E. (2d) 6, 8 (1937); *Rabbit v. Weber & Co.*, 297 Ill. 491, 496, 497, 130 N. E. 787 (1921); *Hultberg v. Anderson*, 252 Ill. 607, 615, 97 N. E. 216 (1912). In the latter case, the court said, at Page 615:

> "Under the due process clause of the constitution a party is not only entitled to notice of the proceeding

> against him but he is also entitled to be heard in his defense. Of what avail is it to summon a party into court if after he appears the Court arbitrarily refuses to hear him? A judgment pronounced without any judicial determination of the facts which alone can support such judgment is merely the arbitrary edict of the judge, and is as much wanting in due process of law as though the party against whom it is entered had received no legal summons."

And this is true even though the Court is said to have "jurisdiction" of the party.

Certainly, if Cosby Jr. is to be bound by "privity" with Cosby Sr., he must be given an opportunity to be heard on Cosby Sr.'s objections. If he is to stand in the same position as his predecessor, he must be given the same opportunity to be heard to which his predecessor was entitled. Any other ruling would deny the protection of due process to a non-party who is less able to protect himself than one who has had notice as a party to the action.

In ignoring the constitutional issue and treating the present case as a question of the proper remedy, the Circuit Court of Appeals has failed to appreciate the significance of the fact that the Logan County Court failed to provide a hearing while it was aware of the death of Cosby Sr. There is a fundamental distinction in the law of judgments between a judgment which is "void" or invalid as to a particular person, because of lack of reasonable process or the conscious failure of the court to provide an opportunity for a hearing, and a judgment which is valid, but voidable, because through misfortune, without any fault on the part of the court or the process, a person has in fact had no opportunity to be heard. *Restatement, Judgments* (1942) c. 2, § 6, c. 5, § 118.

Prior to the present case it has been uniformly held, by courts having occasion to consider the question, that where a court knows of the death of one of the parties, occurring before hearing, it cannot in due process enter a judgment which will bind the successors in interest of the party dying, without giving the successors an opportunity to be heard, *even though the successors stand "in privity" with the deceased party. Brown v. Fletcher's Estate,* 210 U. S. 82, 90-91, 52 L. Ed. 966, 971 (1908); *Hopkins v. Curtis* 43 R. I. 19, 21, 109 Atl. 711, 712 (1920); *Harris v. Chicago Title and Trust Company,* 338 Ill. 245, 266, 170 N. E. 285, 294

(1930); *Welch v. Louis*, 31 Ill. 446 (1863); *Hoffman v. Hanley*, 187 Ill. App. 551, 553 (2nd Dist.) (1914); *Rives v. Stanford*, 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940).

This Court has held that a judgment against the estate of a party who was known by the Court and parties to have died pending suit, is not entitled to full faith and credit as against the executor and the legatees who resided in another state and were not properly brought into the court rendering the judgment. *Brown v. Fletcher's Estate*, 210 U. S. 82, 52 L. Ed. 966 (1908), involved an attack on a judgment entered in an accounting proceeding brought in Massachusetts against a Michigan resident who died pending the suit. After the party's death the original Massachusetts suit had been revived against the Massachusetts administrator but had not been revived against either the Michigan executor or the Michigan legatees. In holding that the Massachusetts judgment, insofar as it pertained to property which had passed to the Michigan executor, was not entitled to full faith and credit but could be collaterally attacked in Michigan, this Court said, at page 94:

> "On his death the jurisdiction of the Massachusetts court was not wholly destroyed, but suspended until the proper representative of Fletcher was made a party. The Massachusetts administrator was made a party and did appear, and the decree rendered unquestionably bound him, but the executors, the domiciliary representatives of the decedent's estate, did not appear and were not brought into court. The Massachusetts administrator was not a general representative of the estate, and could not bind it by any appearance or action other than in respect to the property in his custody. If the home estate was to be reached it had to be reached by proceedings to which the home representatives were parties."

The Court adopted the language used by the Supreme Court of Michigan that:

> " 'It must be held that the proceedings in the Massachusetts court abated with the death of Mr. Fletcher, that its revivor was possible only because there was brought into existence, by the exercise of the sovereign power of the State, a representative of the decedent, clothed with certain powers with respect to the estate of decedent within the State, and that the decree thereafter rendered in the suit so revived is without effect save upon the administrator of the estate who was in

accordance with the law of the place brought upon the record.' " (pp. 94-95).

In *Harris v. Chicago Title & Trust Company,* 338 Ill. 245, 170 N. E. 285 (1930), the defendant, Russell, who was a resident of Pennsylvania, died pending a suit in Illinois involving the ownership of certain shares of stock. The suit was revived against the Illinois administrator, but not against Russell's Pennsylvania executors. In holding that the suit could not affect the legal title to the stock in the Pennsylvania executors, the Supreme Court of Illinois said, at page 266:

> "On the death of Russell the legal title to these shares of stock vested in his Pennsylvania executors and they were inventoried there as a part of his estate. The decree entered here would not be binding on them without making them parties to the proceeding and could not take from them their title and vest it in another. It follows that the beneficiary of such a decree would not acquire title to the property, and the decree therefore was not such as could command full faith and credit under the comity relation of State. (*Baker v. Baker, Eccles & Co. supra; Brown v. Fletcher, supra.*) When Russell died there was no one before the court who could be compelled to transfer the stock in accordance with the decree, and the decree could avail plaintiff in error nothing."

And the court said again, at page 291:

> "Under the fundamental principle of due process requiring that rights of parties may not be adjudicated unless they are in court, with an opportunity for a hearing, the legal title to one-half (1/2) of this stock cannot be taken from the Pennsylvania executors without making them parties to the suit. This was not done."

In the case of *Hopkins v. Curtis,* 43 R. I. 19, 109 Atl. 711 (1920), there was a bill to construe a will and trust agreement brought by trustees under the will. Under the Rhode Island procedure the cause was certified to the Supreme Court of that State for determination of controverted questions of law and fact. It was necessary that the Supreme Court then hold a hearing before making such determination. The cause was heard in the Supreme Court on February 9, 1920. The court's opinion was filed on March 5th following. On March 26, an affidavit was filed that Henrietta Foster, a respondent, had died on February 8, before

the Supreme Court hearing; also another respondent had been declared insane on February 17, and Amelia Curtis, another respondent had died on February 22. The trustee moved for entry of an order directing the Superior Court to enter a decree *nunc pro tunc* as of February 6, 1920, which was before the hearing in the Superior Court, before the death of Henrietta Foster and before the certification of the cause to the Supreme Court. The Supreme Court held that it could not enter a decree *nunc pro tunc* as of a date prior to the death of Henrietta Foster because, by reason of her death, that part of the estate going to her and then to her heirs was not represented at the hearing. In so holding, the court said, at page 712:

> "In such circumstances a fundamental principle of judicial procedure would prevent the entry of a decree which should attempt to bind those who might be entitled to claim under her. An opportunity to be heard must be given to them or to someone legally qualified to represent them in order to conclude their rights. The complainant would shut off such rights by the entry of a decree as of a day during the lifetime of Mrs. Foster and before that of the hearing. There is no authority worthy to be followed which would justify the entry of such a decree."

The same rule is applied where, in liquidation or receivership proceedings, a receiver or liquidator has received assets while litigation was pending involving the same assets. *Evans v. Illinois Surety Co.*, 319 Ill. 105, 110-111, 149 N. E. 802, 804-805 (1925); *People v. Chicago Lloyds*, 391 Ill. 492, 507-508, 63 N. E. (2d) 479, 487 (1945).

The reasons for the above decisions are obvious. Although public policy may necessitate binding all persons who take "in privity" with a party by reason of an unknown death of the party pending suit, it is manifestly contrary to ordinary standards of fairness to bind the successors without a hearing after the court and the remaining parties are put on notice of their interests by knowledge of the death of the predecessor. In such circumstances, there is no reason of public policy why the duty to give the successors a hearing by the usual modes of procedure should not be put upon the court and the remaining parties to the suit. The conscious failure of the court to follow "established modes of procedure" constitutes a lack of due process which renders the judgment void. *United States v. Walker*, 109 U. S. 258, 27 L. Ed. 927 (1883); *Welch v. Louis*,

31 Ill. 446, 455-456 (1863); *Armstrong v. Obucino,* 300 Ill. 140, 133 N. E. 58 (1921).

Once the court and parties have notice of the death of a party, any action taken will be at the peril of the remaining parties, and no mistake as to the interest of the party dying, or as to the proper successors in interest to be joined, will excuse the non-joinder of the persons actually succeeding to the title, or make the judgment binding against them. *Brown v. Fletcher's Estate,* 210 U. S. 82, 94, 52 L. Ed. 966 (1908); *Harris v. Chicago Title & Trust Co.,* 338 Ill. 245, 170 N. E. 285 (1930); *Hoffman v. Hanley,* 187 Ill. App. 551, 553 (2d Dist. 1914); *Rives v. Stanford,* 188 Okla. 108, 109, 106 P. (2d) 1101, 1103 (1940).

The case of *Hoffman v. Hanley,* 187 Ill. App. 551, 553 (2d Dist. 1914), is squarely in point in the instant case. In that case the mortgagee had filed a bill to foreclose a mortgage against John Hanley and his wife who held the title to the land as tenants in common. While the suit was pending Mrs. Hanley died intestate, leaving five children surviving. Her death had been suggested of record, but on the mistaken assumption that she had in her lifetime only a dower interest in the land, the foreclosure proceeded to a decree, finding that she had only a dower interest, without making her heirs parties. The mortgagee had bid in the property at the master's sale and had assigned the master's certificate of purchase to one who in due time had received a master's deed to the premises. Later, when the mistake as to the title was discovered, the mortgagee and purchaser filed a bill to subject the interest of the five children to the lien of the mortgage. The court held that the foreclosure and sale were entirely ineffective to pass any title to the purchaser at such sale.

The court also held that the mortgage indebtedness had been discharged by the sale and that the rule of *caveat emptor* applied. In reference to the hardship on the purchaser, the court said at page 554:

> "The hardship here comes from a mistake by a purchaser at a judicial sale as to the title he will acquire by his purchase. Many cases have arisen where such mistakes have been made, and the law has been long settled that the rule of *caveat emptor* applies."

On the above authorities it clearly makes little difference, where the court and parties know of the death of one of the parties prior to judgment, whether or not "privity"

is held to have existed between the deceased party and his successors in interest. Under the circumstances the successors cannot be bound by the decree because both they and their predecessor in interest have been deprived by the Court and the remaining parties of an opportunity to be heard with respect to their interest. The very basis of the doctrine of *res judicata* is absent.

IV.

Cosby Jr. cannot constitutionally be bound by the decrees of the Logan County Court because there was no effective privity between him and Cosby Sr. at the time those decrees were entered.

Without "privity" between Cosby Jr. and Cosby Sr. at the time of the confirmation decree, Cosby Jr. cannot constitutionally be bound thereby, even though his interest did not vest until after suit was pending and after the decree of sale was entered. *Botsford v. O'Conner,* 57 Ill. 72 (1870).

"Privity" has been defined in terms of representation by *Van Fleet, Former Adjudication* (1895), Vol. II, Chapter XVII, Page 909, as follows:

> "In order to conclude any right, title, or interest of a person by an adjudication, it is essential that he be a party to the proceeding or be represented by one. In the latter case, he is said to be a privy."

In *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 62 L. Ed. 1215 (1918), this Court has held that mere successorship in interest is not enough to create privity but that, to be binding upon the successor the predecessor in interest must have been the owner of the title at the time of the entry of judgment, in the following language:

> "The ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere.* From this it follows that nothing which the grantor can do or suffer after he has parted with the title can affect rights previously vested in the grantee, for there is no longer privity between them. This doctrine is universally accepted . . . (citing cases)".

And it has also been held by this Court that a non-party cannot constitutionally be bound by a judgment unless the party supposed to represent him in the suit holds an iden-

tical interest and is fully capable of representing the non-party. *Hansberry v. Lee,* 311 U. S. 32, 85 L. Ed. 22 (1940). The representation must exist at the time of the judgment and, where a non-party was originally in privity with a party to a suit but the party has ceased truly to represent the non-party at the time of judgment, the rule of privity has no application and the judgment entered will not bind the non-party. *Indiana Harbor Belt RR. Co. v. Calumet,* 391 Ill. 280, 288, 63 N. E. (2d) 369, 373 (1945).

To the same effect are the many cases which hold that, where the suit is adversary and not *in rem* and the title to property involved therein has descended to non-party heirs or devisees by reason of the death of a party pending suit, the heirs or devisees are not bound by the judgment subsequently entered. *Kager v. Vickery,* 61 Kan. 342, 59 Pac. 628, (1900); *Sargeant v. Rowsey,* 89 Mo. 617, 622-623, 1 S. W. 823, 824 (1886); *Zaegel v. Kuster,* 51 Wis. 31, 38, 7 N. W. 781, 782 (1881); *Hunt v. Acre,* 28 Ala. 580, 596, 598 (1856). The theory of these cases is that, upon the death of the party in interest, all privity between him and his successors ceases and new rights arise in the successors which may not be affected by the judgment unless the successors are joined as parties and given an opportunity to be heard. This principle has been well expressed by this Court in *Green v. Watkins,* 6 Wheat. 260, 5 L. Ed. 256 (U.S. 1820) at page 260, as follows:

> "There is a material distinction between the death of parties, before judgment and after judgment, . . . in the former case, all personal actions, by the common law, abate; and it required the aid of some statute, like that of the 31st section of the Judiciary Act of 1789, ch. 20, to enable the action to be prosecuted by or against the personal representative of the deceased, when the cause of action survived. *In real actions, the like principle prevails, for a still stronger reason, for, by the death of either party, the right descends to their heir, and a new cause of action springs up; and the plea is not, therefore, in the same condition as was in the life time of the party.*" (Italics supplied.)

To the same effect is the case of *Requa v. Holmes,* 16 N. Y. 193 (1857), reaffirmed 26 N. Y. 338 (1863), wherein the successors in interest of a party dying pending the former suit were allowed, in a collateral ejectment action, to avoid the former decree and sale which had been entered

in the previous partition suit many years earlier. The father of the ejectment plaintiffs had been made a defendant in the partition suit but had died prior to the order of sale. Nevertheless, the sale had been confirmed and deeds had been made to the purchaser who was the grantor of the defendant in the ejection action. In holding that the partition decree and sale were void as to the plaintiffs and could not bind their interests in any way, the court said, at page 198:

> "The general rule is, that judgments and decrees bind only parties and their privies. Samuel Requa, on his death, ceased to be a party. He was not, in any sense, a party to the decree directing the sale, and there was no privity whatever, either in estate or otherwise, between his heirs and the surviving parties. By his death the suit became equally as defective as if he had not been made a party."

In personal actions not involving successorship of title, where the court is ignorant of the party's death and has proceeded with a full hearing in which the decedent was fully represented by counsel, the lack of a living party to the judgment is a mere formal or technical defect which may be corrected by *coram nobis* or bill of review. But where, because of knowledge of the death, there has been no hearing, any privity between decedent and his successors is totally ineffective. In fact, no one has been allowed to litigate the interests of the successors. Surely arguments of public policy have no application where the court knows of the death prior to hearing and makes no provision for a hearing of any kind on the objections filed.

In any event, true privity between Cosby Jr. and Cosby Sr. was prevented in the present case by the finding of the Logan County Court that the land was held in trust under the Chappelear will, which gave Cosby Sr. a life estate only. The decree of sale specifically found that the allegations of the petition were true (R. 274), including the allegation that Mrs. Chappelear had ". . . devised and bequeathed all of her property unto (Johnston), as Trustee, on the terms and conditions in said will contained . . ." (R. 257). According to basic rules of *res judicata,* if the decree of sale is binding, it is binding in all respects and is not affected by later decisions of another court whether that other court be inferior or superior in its jurisdiction. 2 *Freeman, Judgments,* (5th ed. 1925) §§ 633, 634, pp. 1333, 1336; *Peo. v. Russell,* 283 Ill. 520, 523-4, 119 N.E. 617, 618 (1918). If a

decree is held *res judicata,* a determination therein that title is in certain persons, no matter how erroneous, will bind those who are bound by the decree. *Hopkins v. Patton,* 257 Ill. 346, 348-9, 100 N. E. 992, 993-4 (1913).

Even though a later decision of the same or another court finds the title to be in other persons, the findings of the court in the prior proceedings are, *for the purpose of that proceeding,* binding on all persons bound by or taking under the decrees therein; the rule is stated in 2 Freeman, Judgments, (5th Ed. 1925), Sec. 629 p. 1327, as follows:

> "And though an opposite result has been reached upon the same issue in independent proceedings, *the final judgment in each case must, in subsequent proceedings, be regarded as conclusive for the purposes of the proceedings in which it was rendered and to the extent of rights already enjoyed thereunder.* Thus an adjudication of widowhood in proceedings for a family allowance is not affected by a contrary finding in subsequent distribution proceedings, when the question later arises as to the right to credit for the allowance, on proceedings for settlement of the account. The first adjudication is final and conclusive of the fact of widowhood so far as it affected the granting of the allowance and the right to credit therefor. And a valid decree of divorce, in so far as it fixes the single status of the parties is not overcome by a subsequent inconsistent decree of separation with alimony."

It is clear beyond dispute that, *at the time it was entered,* the order of sale by the County Court of Logan County was completely void as to all freehold interests except the life estate in Cosby Sr., which of course terminated on his death shortly thereafter. There can be no doubt but that an ejectment suit brought by Cosby Jr., or by the holders of the fee under the will, against Harts following the sale proceedings would have been entirely successful.

Under the above authorities the privity found by the Circuit Court of Appeals to exist by reason of the decision of the Supreme Court of Illinois in the case of *Johnston v. Cosby,* 374 Ill. 407, 29 N. E. (2d) 608 (1940), seems entirely spurious. The decision in that case, rendered more than two years after the sale proceeding in Logan County, could not overrule the finding of the Logan County Court, does not purport to do so, and, in fact makes no mention whatever of the Skelton Farm or the sale proceeding. Moreover, a "privity' supposed to be established more than two

years after the proceeding in question could not possibly supply that representation of the non-parties which is required to exist at the time of judgment in order to make the judgment binding against them. *Postal Telegraph Cable Co. v. Newport,* 247 U. S. 464, 474-476, 62 L. Ed. 1215, 1220-1221 (1918); *Hansberry v. Lee,* 311 U. S. 32, 85 L. Ed. 22 (1940).

That there is no privity effective to bind a non-party who succeeds to the fee title by the death of a party pending suit, where the court has erroneously found that the party had only a life estate, has been squarely held in the case of *Hoffman v. Hanley,* 187 Ill. App. 551 (2d Dist. 1914). There a mortgagee proceeded in foreclosure against John Hanley and his wife. Although the defendants actually held the fee title as tenants in common, the court found Mrs. Hanley to have only a life interest, and as a result, when she died pending foreclosure, her children were not made parties to the suit. In a subsequent collateral action, the court held that her children took her equity in the land exactly as if she had never been made a party to the foreclosure proceedings. Although the foreclosure decree and sale had the effect of discharging the mortgage, it had no effect whatever on the fee interest which was actually held by the wife and to which the children succeeded. See also *Sutton v. Read,* 176 Ill. 69, 80, 82, 51 N. E. 801 (1898).

Judgments are held binding against parties only in the character of ownership in which they sue or are sued. *Phillips v. Parker,* 148 Kan. 474, 479, 480, 82 P. 2d 708, 712, 713 (1938); *Elliott v. Frakes,* 71 Ind. 412, 416 (1880), reaffirmed on second appeal, 90 Ind. 389, 393 (1881); *Hansen v. Schwartz,* 345 Ill. 609, 616, 178 N. E. 246 (1931).

A similar rule is followed in the Illinois partition cases in applying the doctrine of representation to bind persons who are not in being at the time of suit. To make certain that the interests of the unborn are properly litigated, the parties must properly set forth in the pleadings the true interests of the non-parties, in order to bind them. *Weberpals v. Jenny,* 300 Ill. 145, 156, 133 N. E. 62, 66 (1921); *Baker v. Baker,* 284 Ill. 537, 543, 120 N. E. 525, 528 (1918).

V.

The confirmation decree can not constitutionally be held to bind the interests of Cosby Jr. because Johnston knowingly failed in his fiduciary duty to join Cosby Jr. as a party and, while purporting to represent him as trustee in Johnston's own petition, suffered the decree to be entered in derogation of Cosby Jr.'s rights wtihout any contest in his behalf.

The petition for sale filed by Johnston in the Logan County Court shows that it was never intended that the sale proceedings be adversary in nature. The Illinois statute (Ill. Rev. Stat. 1937, c. 3, para. 100) specifically provided that "the widow, heirs and devisees of the testator or intestate, and the guardians of any such as are minors, . . . and all persons . . . having or claiming any interest therein in possession or otherwise shall be made parties." Cosby Jr. was certainly a devisee, a minor and a person claiming an interest in the property, as were also the holders of the remainder in fee after the trust provided in the will. Yet, neither Cosby Jr. nor the holders of the remainder were made parties.

In requiring both heirs and devisees and also any person "claiming" any interest in the property to be made parties, the statute was clearly designed to require the joinder of all persons who might have an interest, regardless of the validity or extent of the interest that might later be determined to exist in such persons.

The failure of Johnston, as executor, to make Cosby Jr. and the remaindermen parties while knowing that they *might* have an interest was a "fraud in law" both on the court and on the person not joined, so as to make the decrees of the court wholly ineffective to bind the interests of the non-parties. *Hedlund v. Miner*, 395 Ill. 217, 231, 69 N.E. (2d) 862 (1946); *Walker v. Cook*, 294 Ill. 294, 298, 128 N. E. 584, 486 (1920); *Wright v. Simpson*, 200 Ill. 56, 62 65 N.E. 628, 630 (1902); *Hewitt v. Hewitt*, 17 F. (2d) 716, 717, 719 (C. C. A. 9th 1927); *Diamond v. Connolly*, 251 Fed. 234, 238, 240 (C.C.A. 9th, 1918), same case 276 Fed. 87, 91-92 (C.C.A. 9th 1921). See also *Eddy v. Eddy*, 302 Ill. 446, 452-454, 134 N.E. 801, 803, 804 (1922). The executor in such cases is acting in a fiduciary capacity and is under a duty to make full disclosure to the court of all possible interests that might be affected by the suit. These cases hold that the heir or devisee can establish his interest in a subsequent proceeding, unaffected by the prior judgment.

Instead of joining Cosby Jr. and the other interested persons as parties, Johnston undertook to represent their interests as trustee under the will at the same time that he was acting as *petitioner* in the sale proceedings. This is admitted and specifically pleaded by both Johnston and Harts in their answers. Both defendants admit that, during the course of the sale proceeding, the trust and estates created by the Chappelear will were considered valid (R. 28, 38), and that, as executor and trustee under the will, Johnston occupied a dual fiduciary position, with the duty of protecting the interests of the estate and its beneficiaries (R. 29, 39). In paragraph 11 of Harts' answer (R. 38), he says:

> "These defendants admit that during the course of the proceedings to sell the said farm, the trust created by the will of May Barrett Chappelear was considered valid and all parties believed that Percy B. Johnston as Trustee under that will held the full legal title to the farm land sold to David H. Harts, *and aver that Percy B. Johnston, as trustee, in fact acted as a petitioner in the proceedings to sell, and did so in the best interests of the Estate.*"

Thus, although he did not join himself as a party defendant, Johnston was, in effect, attempting to represent both sides of the same suit and was, as executor, suing himself as trustee. Obviously, such a procedure was purely nonadversary except as to Cosby Sr.'s supposed life estate. Where an administrator or executor brings a petition involving property in the estate, and at the same time, undertakes or purports to represent the interests of persons interested in the estate who would normally be defendants to the petition, the proceeding is a sham, a fraud and a meaningless formality, and the persons supposedly represented will not be concluded or bound by the decrees rendered therein. *McArthur v. Scott*, 113 U. S. 340, 394, 28 L. Ed. 1015 (1885); *Pfister v. Johnson*, 13 Fed. Supp. 662, 665-66 (N. D. Okla. 1936); *Fisher v. Banta*, 66 N. Y. 468, 481-82 (1876); *Swope v. Swope*, 173 Ala. 157, 164, 55 So. 418 (1911); See *People v. Feicke*, 252 Ill. 414, 420, 96 N. E. 1052 (1911); to the same effect where service of process on a minor is had by delivery of same to one having an adverse interest in the suit. *Heppe v. Szczepanski*, 209 Ill. 88, 104, 106, 70 N. E. 737 (1904); *Manternach v. Studt*, 230 Ill. 356, 361, 82 N. E. 829 (1907).

The case of *Pfister v. Johnson*, 13 Fed. Supp. 662, 665-

666 (N.D. Okla. 1936), is closely similar to the present case on this point. In that case the plaintiff brought an action in equity to cancel conveyances which had been made pursuant to an administrator's sale to pay debts and for an accounting. In a previous proceeding in the county court to sell real estate to pay debts of the plaintiff's deceased mother, the administrator, purportedly acting also as plaintiff's guardian, had filed a purported waiver of the heirs of said decedent and consent to the order of sale. In his petition the administrator had failed to state the homestead interest of the decedent and of the plaintiff. Against the contention of the defendant purchaser that the decree of sale of the county court constituted an adjudication that the land was not a homestead and that this adjudication was binding on the plaintiff, the court held that the action of the administrator in attempting to represent the plaintiff as guardian and to waive notice of the hearing and consent that the decree of sale be entered, constituted such a gross fraud upon the rights of the plaintiff ". . . as a matter of law . . ." that the proceedings were not adversary and the decree therein could not be held to bind the plaintiff's interest.

The conduct of an administrator or executor in suffering a decree to be entered in derogation of the rights of non-parties without any contest in their behalf, at the same time that he is purporting to represent them, is directly in fraud of the rights of the non-parties. Under such circumstances the judgment so entered is, as to such non-parties, totally void and subject to "collateral attack" by them. *Restatement, Judgments* (1942) § 91, pp. 450 et seq. As there stated, at page 451:

> "This result is necessary since such persons are not parties to the action and may have no notice of it, or if they do have notice they may not be able to intervene for the protection of their interest. The fact that such persons have a right to direct attack upon the judgment through equitable relief, (see Sections 112-130) does not prevent them from also having the right to disregard the judgment and to proceed directly against persons who have acquired the property as a result of the judgment as if no such judgment had been rendered."

Where the non-party, whose interests the fiduciary is purporting to represent, is a transferee of the property by death of a party pending suit, the rules of privity and *lis*

pendens have no application and the non-party is not bound in any way by the judgment; the purchaser at the sale, who obtains title to the property under the judgment acquires no real interest in the property but must hold it in constructive trust for the defrauded non-party. *Restatement, Judgments* (1942) § 91, Comment e, p. 454.

It is plainly apparent in the present case that the sale proceeding was almost entirely non-adversary in its origin and became purely non-adversary on the death of Cosby Sr., as a result of the conduct of Johnston. First he failed to join as parties Cosby Jr. and other supposed owners of the title and undertook to represent those interests himself. After the sale Johnston was on the spot. Harts had bought at a low price - - far lower than Johnston expected - - and Harts was his brother-in-law, with whom he was quite close and friendly. If he had been an independent trustee and not acting as petitioner in the suit, he would clearly have felt called upon to object to the sale. In this predicament, obviously to save himself embarrassment by having to take sides either for or against Harts or for or against the interests of his beneficiaries under the trust, Johnston refused to sign an adversary report of sale and submitted a report that was entirely non-committal, suggesting that there were other persons who would file objections and that he therefore did not make a request for either confirmation or rejection. Cosby Sr.'s objections caused the proceeding to become adversary until he died on July 21, when once again Johnston was in the position of the sole real party to the suit in conflicting dual fiduciary capacities. Yet he made no objections on behalf of his beneficiaries and made no effort to alter his report of sale. Nor did he make any effort to join the plaintiffs as parties, or advise them that they should intervene, or inform them that they should have independent representation and counsel, or do *anything* to assure them an opportunity to be heard in a fair and adversary trial of their interests. He did not even inform the plaintiffs that the objections filed by Cosby Sr. remained undisposed of at the time of his death (R. 141).

On the day of the hearing he did not appear, and his attorney, Mills, (whose name and address appeared on the cover of Cosby Sr.'s objections) stood silently by while the court overruled the objections and entered the order of confirmation without any trial whatever. As alleged in the complaint and admitted by Johnston on the trial of

this case, Johnston put both of the plaintiffs on the train for California just three days before August 2nd, the date set for the hearing on Cosby Sr.'s objections, thus insuring absolutely that plaintiffs would not be present at the hearing and would not be represented by any one therein who might urge objections to the sale. That there was no serious attempt made to conduct a true adversary proceeding is demonstrated in this case beyond dispute, and the decrees entered in such a proceeding cannot constitutionally bind persons who were not parties.

VI.

Even if the decrees of the Logan County Court were, in any respect, valid against the interest of Cosby Jr., he is entiled to equitable relief from those decrees against Harts who bought at the sale with full notice and knowledge of the defects in the sale proceeding.

It cannot be denied that Cosby Jr. was, without his fault, deprived of a hearing in the sale proceeding in the Logan County Court. Nor can it be denied that Harts knew or had notice that Cosby Jr. was a person "having or claiming an interest" in the premises sold and was not made a party. He had full notice thereof on the record and admits in his answer that he believed the interests under the will to be valid (R. 38). Through conversations with Johnston, Harts was in constant contact with the sale proceeding throughout its course (R. 162, 166-170). He knew that Cosby Sr. died prior to the day set for hearing the objections (R. 169). Harts realized that the sale proceeding was defective and, shortly after he obtained his deed, paid for the assignment of the mortgage on the farm, but had the mortgage assigned to a nephew of his wife and Johnston ". . . to keep the lien alive . . ." and thus, at least, to be ". . . secured to the extent of the mortgage . . ." in case the sale was held invalid. (R. 175, 176). Now he is trying to keep the title by imposing a "privity" on Cosby Jr. by reason of the decision two years later in *Johnston v. Cosby*, 374 Ill. 407, 29 N.E. 608 (1940), to which suit he was not even a party. His position amounts merely to a claim of "title by accident."

Cosby Jr. is not guilty of *laches* in bringing his suit to redeem and recover the land. He was a minor, fifteen years of age, at the time of the sale proceeding, and he brought the present suit in May of 1944, approximately six months after he became of age in November of 1943.

There is a long line of decisions in the Illinois courts establishing the rule that infants are entitled to the special protection of a court of equity and will be allowed, even where they were made parties to the prior proceeding, to establish their rights of which they have been erroneously deprived, by an original bill in equity against a purchaser who took with knowledge or notice of the errors. *Loyd v. Malone*, 23 Ill. 41, 43, 44 (1859); *McReynolds v. Miller*, 372 Ill. 151, 153-154, 22 N. E. (2d) 951, 952 (1939); *Denk v. Fiel*, 249 Ill. 424, 431, 94 N. E. 672, 675 (1911).

The federal courts of equity are constitutionally bound to give no less equitable relief than that to which the plaintiff would be entitled in the state courts, when petitioned so to do by a party of diverse citizenship. Point I, page 14, of this brief.

Respectfully submitted,

B. Lacey Catron,
Herbert C. Brook,
Attorneys for Petitioner.